Calendar No. 345

107TH CONGRESS, *2d Session* | SENATE | REPORT 107–142

OLDER WORKERS' RIGHTS RESTORATION ACT OF 2001

APRIL 15, 2002.—Ordered to be printed

Mr. KENNEDY, from the Committee on Health, Education, Labor, and Pensions, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 928]

The Committee on Health, Education, Labor, and Pensions, to which was referred the bill (S. 928) to amend the Age Discrimination in Employment Act of 1967 to require, as a condition of receipt or use of Federal financial assistance, that States waive immunity to suit for certain violations of that Act, and to affirm the availability of certain suits for injunctive relief to ensure compliance with that Act, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

Age discrimination is a serious and persistent problem nationally, including among State agencies. The Federal prohibition against age discrimination in employment by the States was established by the 1974 amendments to the Age Discrimination in Employment Act of 1967 (ADEA), and has been upheld by the Supreme Court.

In *Kimel* v. *Florida Board of Regents*, the Supreme Court held that Congress lacked the power to subject States to suit under the ADEA. As a result of this decision, state employees who are victimized by age discrimination cannot sue to vindicate their Federal rights. States are immune from suit under the ADEA unless they have explicitly consented to be sued or unless the Equal Employment Opportunity Commission brings suit on behalf of the victim.

Kimel created a serious loophole in existing civil rights protections. Unlike similar victims of age discrimination employed by the private sector and local and Federal Government agencies, State employees after *Kimel* lack a right of private action under Federal law to redress age discrimination against them. While most States do have State laws prohibiting age discrimination, these laws do not replace the consistency of the protections, rights and remedies afforded by Federal law. For example, the substance of some State laws is less protective than the ADEA; some States provide less generous remedies.

S. 928, the Older Workers' Right Restoration Act of 2001, is designed to address this loophole. The bill provides that State programs and activities that accept Federal funds will thereby waive their immunity to Federal suit by employees of those programs who claim that they have been the victims of age discrimination. The Act also confirms that actions for equitable relief against State officials in their official capacity remain available for all State employees under the ADEA.

S. 928 does not create new duties for States. States are now—and have been for more than 25 years—prohibited from discriminating against their employees on the basis of age. S. 928 simply restores the remedies that State employees were afforded before the *Kimel* decision and that all other employees protected by the ADEA enjoy. S. 928 was modeled on numerous other civil rights statutes, including Title VI of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, that use similar approaches to guarantee that Federal funds will not be used to subsidize discrimination.

S. 928 is intended to ensure that State workers—like all other workers covered under the Age Discrimination in Employment Act—have adequate remedies when they are the victims of unlawful conduct. The committees believes that no one should be subjected to discriminatory hiring, firing or other job action based on age or any other characteristic that is unrelated to job performance. Age discrimination wastes valuable talent and hurts morale. S. 928 will afford to State employees the full range of remedies and procedures available to redress such discrimination when it occurs.

II. Background and History of the Legislation

In 1967, Congress outlawed age discrimination in employment in the private sector by passing the Age Discrimination in Employment Act. In 1974, recognizing that employees of State government agencies were also often subject to pervasive and arbitrary age discrimination, Congress extended the Act to cover State governments. For more than 25 years, State employees were protected from age discrimination, and had the same remedies as all other employees covered by the law.

But in *Kimel* v. *Florida Board of Regents,* decided last year, the Supreme Court held, 5–4, that Congress lacked the constitutional authority to subject States to suits by individuals claiming violations of their rights under the ADEA. This decision reversed the long-standing interpretation of the law—including by 6 of the 8 Federal circuit courts to have considered the question—that State employees were entitled to the remedies and procedures provided to all other employees protected under the ADEA.

The constitutional underpinnings—as well as the impact—of the *Kimel* decision were addressed in detail at a hearing held by this committee on April 4, 2001. At that hearing, entitled "States' Rights and Federal Remedies: When Are Employment Laws Constitutional?," committee members heard from Dr. J. Daniel Kimel, a professor at Florida State University and the plaintiff in the *Kimel* case; Michael H. Gottesman, Professor of Law at Georgetown University Law Center; Marci A. Hamilton, Visiting Professor of Law at New York University School of Law; and David Strauss, Harry N. Wyatt Professor of Law at the University of Chicago Law School. Each of the witnesses confirmed that the approach taken by S. 928 is constitutional.

S. 928 was introduced on May 22, 2001 and is virtually identical to S. 3008, the version of the bill introduced by Senators Jeffords, Kennedy and Feingold in the 106th Congress. On September 13, 2001, the Senate Committee on Health, Education, Labor, and Pension, acting in Executive Session, ordered S. 928 reported by a vote of 12 to 9.

III. Section-by-Section Analysis

Section 1. Short title

Section 1 provides that the Act may be cited as the "Older Workers' Rights Restoration Act of 2001."

Section 2. Findings

Section 2 sets forth Congressional findings.

Section 2(1) states that the Age Discrimination in Employment Act has prohibited States from discriminating on the basis of age since 1974, more than 25 years ago. The Supreme Court has upheld Congress' constitutional authority to apply these prohibitions to the States.

Section 2(2) states that age discrimination in employment remains a serious problem both nationally and among State agencies. The section further addresses the invidious effects that such discrimination has on its victims, including increasing the risk of unemployment, preventing the best use of available labor resources,

adversely affecting morale and productivity, and perpetuating unwarranted stereotypes about the abilities of older workers.

Section 2(3) states that private civil suits by victims of employment discrimination have been a crucial tool for enforcement of the Age Discrimination in Employment Act, and further states that the Supreme Court's *Kimel* decision cut back on the availability of those suits against State employers. Section 2(3) also sets forth the Federal Government's interest in ensuring that Federal financial assistance is not used to subsidize or facilitate violations of the Age Discrimination in Employment Act.

Section 2(4) examines the effects of the *Kimel* decision, and finds that, although age-based discrimination by State employers remains unlawful, State employees lack important remedies for discrimination that are available to all other employees covered under the Age Discrimination in Employment Act. The section states that State employees will have no adequate Federal remedies for violations of that Act unless a State chooses to waive sovereign immunity or the Equal Employment Opportunity Commission brings a suit on their behalf. Without the deterrent effect of such suits, the committee finds that there is a greater likelihood that Federal funds will be used to subsidize or facilitate violations of the Act.

Section 2(5) finds that Federal law has long treated nondiscrimination obligations as a core component of programs or activities that, in whole or in part, receive Federal financial assistance and that that assistance should not be used in any way to subsidize invidious discrimination. The committee finds that assuring nondiscrimination in employment is a crucial aspect of assuring nondiscrimination in federally supported programs and activities.

Section 2(6) describes the Age Discrimination Act of 1975, which does not apply to employment discrimination. The section states that that limitation was originally intended only to avoid duplication with the Age Discrimination in Employment Act, but has, in the wake of *Kimel,* become a serious loophole in Federal age discrimination law.

Section 2(7) finds that the Supreme Court has upheld Congress' authority to condition receipt of Federal financial assistance on acceptance by the recipients of conditions on the use of that assistance, including a requirement that States waive their sovereign immunity to suits for a violation of Federal law. The section states that it is necessary to require such a waiver in this case in order to assure compliance with, and to provide effective remedies for violations of, the Age Discrimination in Employment Act.

Section 2(8) states that a State's receipt or use of Federal financial assistance in any program or activity of the State will constitute a limited waiver of sovereign immunity under the Age Discrimination in Employment Act, to suits brought by employees within that program or activity. The waiver will not eliminate a State's immunity with respect to programs or activities that do not receive or use Federal financial assistance. Where a program or activity is covered by the waiver, State employees will be accorded only the same remedies that are available to other employees under the Age Discrimination in Employment Act.

Section 2(9) makes clear that State sovereign immunity does not bar suits for prospective injunctive relief brought against State officials. It is the committee's intent to clarify that the Age Discrimi-

nation in Employment Act authorizes such suits, for the same injunctive relief that was available to State employees before the *Kimel* decision and that is available to other employees under the Act.

Section 3. Purposes

Section 3 sets forth the purposes of S. 928: to provide to State employees in programs or activities that receive or use Federal financial assistance the same rights and remedies that are available to other employees under the Age Discrimination in Employment Act; to provide that the receipt or use of Federal financial assistance for a program or activity constitutes a State waiver of sovereign immunity from suits under the Act by employees of that program or activity; and to affirm that suits for injunctive relief under the Act are available against State officials in their official capacities.

Section 4. Remedies for State employees

Section 4 amends Section 7 of the Age Discrimination in Employment Act (29 U.S.C. 626) by adding sections (g)(1)(A), (g)(1)(B) and (g)(2).

Section (g)(1)(A) states that a State's receipt or use of Federal financial assistance for any program or activity of the State will constitute a waiver of sovereign immunity to suit by an employee of that program or activity under the Age Discrimination in Employment Act, for relief as authorized in that Act.

Section (g)(1)(B) makes clear that the term "program or activity" has the meaning given the term in Section 309 of the Age Discrimination Act of 1975.

Section (g)(2) confirms that a State official may be sued in his/her official capacity, for violations of the Age Discrimination in Employment Act, by any employee who has complied with the requisite procedures of that Act and who seeks injunctive relief authorized in the Act. This section authorizes a court to award costs to the prevailing party, as authorized by section 722 of the Revised Statutes.

Section 5. Severability

Section 5 states that if any provision, amendment made by, or the application of any provision, of S. 928 is held to be invalid, it will not affect the remaining provisions of the bill, the amendments made by the bill, or the application of those provisions or amendments.

Section 6. Effective date

Section 6(a) provides that, as to each program or activity, the provisions of this bill will apply to conduct occurring on or after the day, after the date of enactment of the bill, on which a State first receives or uses Federal financial assistance for that program or activity.

Section 6(b) states that section 7(g)(2) of the Age Discrimination in Employment Act, as added by S. 928, applies to any suit pending on or after the date of enactment of S. 928.

IV. EXPLANATION OF THE BILL AND COMMITTEE VIEWS

The committee seeks to respond to the Supreme Court's decision in *Kimel* v. *Florida Board of Regents*, and to restore to employees of State government agencies the rights and remedies that they enjoyed prior to the *Kimel* decision and that are accorded to all other workers protected under the Age Discrimination in Employment Act. These rights and remedies are necessary to ensure that State employees will be effectively protected against employment discrimination on the basis of age. S. 928 will also ensure that State employees will be treated in the same way, and be entitled to the same recourse, as workers in other sectors of the economy who are victimized by age discrimination. The committee believes that S. 928 achieves these goals in a reasonable, moderate, and lawful way.

Section 2. Findings

Section 2 sets forth the committee's findings with regard to the background of, the need for, and the lawfulness of, S. 928. These include the following:

The committee believes that age discrimination remains a serious problem for State employees. For example, the committee heard testimony from J. Daniel Kimel, a professor of physics at Florida State University, who has no recourse for the age-based salary discrimination to which he believes he has been subjected.

The committee is also aware of the numerous cases in which courts were forced to reverse judgments against State employers, who were found to have discriminated on the basis of age, in the wake of the *Kimel* decision. See, e.g., *McGinty* v. *State of New York*, 193 F.3d 64 (2d Cir. 1999), dismissed on remand in light of *Kimel*, 184 F. Supp. 2d 314, 2000 WL 132720 (N.D.N.Y. Jan. 19, 2000) (death benefits reduced on the basis of age; court found willful violation of ADEA); *Wichmann* v. *Board of Trustees*, 180 F.3d 791 (7th Cir. 1999), vacated and remanded in light of *Kimel*, 120 S.Ct. 929 (Jan. 18, 2000) (48 year old employee terminated because his employer wanted "to cut down the old, big trees so the little trees underneath can grow"); *Arnett* v. *California Public Employees Retirement System,* 179 F.3d 690 (9th Cir. 1999), vacated and remanded in light of *Kimel*, 120 S.Ct. 930 (Jan. 18, 2000) (younger employees received greater disability retirement benefits than older workers with same length of service); *Mete* v. *New York State Office of Mental Retardation and Developmental Disabilities,* 984 F. Supp. 125 (N.D.N.Y. 1997), aff'd, 162 F.3d 770 (2d Cir. 1998), vacated and remanded in light of *Kimel*, 120 S.Ct. 928 (Jan. 18, 2000). Because there are more than 5 million State employees across the country and based on the committee's careful examination of this issue and the testimony received, the committee does not believe that these are isolated problems; a significant component of the Nation's workforce is at risk.

Absent this bill, State workers affected by this type of discrimination will lack important Federal procedures and remedies to redress it. These procedures and remedies, which are available to all other employees covered under the Age Discrimination in Employment Act—including in the private sector and in the Federal and Local Governments—serve important deterrent purposes, as well

as providing compensation and make-whole relief to the victims of unlawful conduct. Without such remedies, it is more likely that State programs and activities that receive Federal financial assistance will use that assistance to violate the law.

Congress has long endorsed the core principle that Federal monies should not be used to subsidize or facilitate invidious discrimination. This principle is reflected in some of the Nation's most important civil rights laws, including Title VI of the Civil Rights Act of 1964 (prohibiting race and national origin discrimination in programs and activities receiving Federal financial assistance); the Rehabilitation Act of 1973 (comparable provisions prohibiting discrimination based on disability); and Title IX of the Education Amendments of 1972 (prohibiting sex discrimination in education programs that receive Federal funds). It is reflected in the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), which prohibits age discrimination in federally subsidized programs. Because Congress believed that the Age Discrimination in Employment Act of 1967 adequately prohibited age discrimination in employment, it decided, in 1975, not to include employment in the universe of activities covered by the Age Discrimination Act of 1975. In the wake of the *Kimel* decision, and its devastating impact on remedies for age discrimination in employment, that choice has created a serious loophole in the constellation of Federal protections. It is the purpose of S. 928 to close that loophole.

The committee believes that a crucial aspect of ensuring nondiscrimination in federally assisted programs and activities is to ensure that there is no discrimination against those who carry out those programs and activities. Because it affects the people who carry out a program or activity's mission, employment is inextricably linked to the implementation of federally assisted programs and activities, whether those programs and activities concern transportation, education or the environment. Where a federally assisted program discriminates against its workers on a prohibited basis, that program has violated not only fundamental notions of fairness but also the commitment that Congress has made to ensure the nondiscriminatory expenditure of Federal funds.

The Supreme Court has consistently upheld Congress' authority to condition receipt of Federal financial assistance on acceptance by recipients of conditions related to the use of that assistance. See, e.g., *South Dakota* v. *Dole,* 483 U.S. 203 (1987). Furthermore, even while invalidating certain Congressional efforts to abrogate States' sovereign immunity, the Court has noted that Congress retains the power, within limits set forth in *Dole,* to convince States to voluntarily waive their sovereign immunity as a condition attached to acceptance of specified Federal funds. *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666, 686–87 (1999); *Alden* v. *Maine,* 527 U.S. 706, 755 (1999).

S. 928 satisfies the criteria stated in *Dole* for determining the validity of conditioning Federal grants to States. In *Dole,* the Court upheld the conditioning of certain highway funds upon a State's prohibition of the purchase or public possession of alcoholic beverages by persons under twenty-one years of age. 483 U.S. at 205–06. The *Dole* Court recognized five limits on such an exercise of Congress' Spending Power. Id. at 207–11. First, the Spending Power must be utilized in pursuit of the general welfare. Id. at 207.

Second, the condition attached to the funds must be expressed clearly and unambiguously. Ibid. Third, the condition must be germane to the Federal interest in a particular program. Id. at 207–08. Fourth, the power may not be used to induce the States to engage in activity that would be itself unconstitutional. Id. at 208–11. Fifth, the financial inducement offered by Congress may not be "so coercive as to pass the point at which pressure turns into compulsion." Id. at 211 (internal quotation marks omitted).

These conditions are amply met. First, the funds in question are intended to serve valid public purposes. Second, the conditions attached to the funds are expressed unambiguously. Third, the condition is germane to the Federal interest in each program affected by the condition. The condition simply furthers Congress' interest in ensuring that all intended beneficiaries of the program funded by Congress are in fact able to participate in that program, and that they may do so on fair and equal terms. The connection between the Federal assistance and the condition imposed on that assistance by S. 928—ensuring that the intended beneficiaries actually benefit—is even tighter than the connection upheld in *Dole*. In *Dole*, the Court upheld a connection that required States, in order to receive certain Federal funds, to take action that was entirely separate from the operations of any Federally funded program. The spending condition of S. 928, by contrast, applies only on a program-by-program basis—requiring a waiver of immunity only as to the particular programs or activities that actually receive Federal funds—and does not require the State to take any external action. Fourth, S. 928 does not induce States to engage in any unconstitutional activity. Fifth, the financial inducement cannot be described as coercive. The inducement—the promise of Federal funds for a State program—is no more coercive than similar program-wide inducements offered by Congress in a variety of civil rights statutes that condition Federal funds upon a State's agreement to refrain from discriminating on various grounds: the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Rehabilitation Act of 1973. No court has ever found such an inducement to be unconstitutionally coercive. The additional condition that a State must waive its sovereign immunity from suits brought by an employee of a program or activity receiving Federal funds does not affect the coercion analysis, which, as was made clear in *Dole,* 483 U.S. at 211, inquires only whether the benefit threatened to be withheld is so substantial as to constitute coercion. Furthermore, S. 928 merely follows the approach taken by Section 1003 of the Rehabilitation Act Amendments of 1986 (42 U.S.C. 2000d–7), which provided that a State shall not be immune from suit for violations of any Federal statute prohibiting discrimination by recipients of Federal funds. Section 1003 therefore adds an additional condition—waiver of sovereign immunity—to the non-discrimination condition imposed by the four civil rights statutes cited above. These dual conditions, which are the same as the conditions imposed by S. 928, have been upheld repeatedly by courts of appeals. See *Douglas* v. *California Department of Youth Authority,* 271 F.3d 812, 819–21 (9th Cir. 2001); *Nihiser* v. *Ohio Environmental Protection Agency,* 269 F.3d 626, 628 (6th Cir. 2001); *Jim C.* v. *Arkansas Department of Education,* 235 F.3d 1079, 1080–82 (8th Cir. 2000) (en banc);

Pederson v. *Louisiana State University,* 213 F.3d 858, 875–76 (5th Cir. 2000); *Stanley* v. *Litscher,* 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan,* 197 F.3d 484, 493–94 (11th Cir. 1999), rev'd on other grounds sub nom. *Alexander* v. *Sandoval,* 532 U.S. 275 (2001); *Litman* v. *George Mason University,* 186 F.3d 544, 551–57 (4th Cir. 1999).[1]

For the foregoing reasons, S. 928 is a constitutional, narrowly tailored exercise of Congress' spending power that allows States to decide, on a program-by-program basis, whether they are willing to accept the Federal conditions in return for Federal money. Each of the witnesses at the committee's hearing on this issue on April 4, 2001 endorsed the constitutionality of this approach.

Section 4. Remedies for State employees

Section 4 contains the core operative language of the bill. It provides that a State's receipt or use of Federal financial assistance for any program or activity of that State will constitute a waiver of sovereign immunity to suits under the Age Discrimination in Employment Act brought to employees of that program or activity.

This language fully meets constitutional standards. A State's waiver of immunity is limited to those programs and activities that receive or use Federal funds; those programs and activities that do not receive or use such funds will be unaffected by this bill. Any waiver of immunity extends only to suits brought under the Age Discrimination in Employment Act by employees of that program or activity.

The bill also does not impose new substantive obligations on the States. For more than 25 years, States have been prohibited from discriminating in employment on the basis of age. S. 928 thus does not require any change in State actions. Where States abide by their longstanding anti-discrimination obligations, there will be no reason for suits to be brought against them.

This bill is necessary because State employees currently have no Federal remedy where States violate the anti-discrimination requirements of Federal law. Although most States have laws that prohibit age discrimination in employment, those laws do not provide the consistency necessary to ensure that all State workers will be adequately protected. For example, the law in one State does not cover public sector employees. Nine States do not allow State employees to bring private lawsuits. Five States do not permit jury trials. Eight States cut off protection for employees at age 70. And 30 States do not require that prevailing parties be reimbursed for

[1] Although the Second Circuit has reached a different conclusion with respect to the Rehabilitation Act, its decision rests on grounds not applicable here. In dismissing a suit against the State University of New York under the Rehabilitation Act, the Second Circuit held that New York had not waived its sovereign immunity from such suits, despite the fact that the State university had received Federal funds, because at the time of the actions that gave rise to the suit, Title II of the Americans with Disabilities Act of 1990—whose proscriptions are virtually identical to the Rehabilitation Act—was reasonably understood to abrogate New York's sovereign immunity under Congress' Commerce Clause authority. Therefore, "a state accepting conditional federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since by all reasonable appearances state sovereign immunity had already been lost." *Garcia* v. *S.U.N.Y. Health Sciences Center of Brooklyn,* 280 F.3d 98 (2d Cir. 2001) (citation omitted).

The Second Circuit's reasoning in *Garcia* is not applicable to S. 928. In the wake of *Kimel*, it is clear that States do possess sovereign immunity from private damages suits brought under the Age Discrimination in Employment Act of 1967. Therefore, a State that chooses to accept conditioned Federal funds will unquestionably "underst[an]d that in doing so it [is] actually abandoning its sovereign immunity from private damages suits."

their attorney fees. The committee believes that the protection of Federal rights should not be left to this patchwork of State law.

The committee intends the term "program or activity" to have the same meaning given the term in Section 309 of the Age Discrimination Act of 1975 (42 U.S.C. 6107). This will make S. 928 consistent with the other civil rights in which this term is used, including not only the Age Discrimination Act, but Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Rehabilitation Act of 1973, as well.

V. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 27, 2001.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on Health, Education, Labor, and Pensions, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 928, the Older Workers' Rights Restoration Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Walker (for federal costs), and Leo Lex (for the state and local government impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 928—Older Workers' Rights Restoration Act of 2001

S. 928 would deem the receipt of federal funds for any program or activity as a waiver of state sovereign immunity with regard to legal liability under the Age Discrimination in Employment Act when a suit is brought by an employee of that program or activity. Because federal funds provide a significant portion of revenues for state governments (roughly one-quarter), CBO expects that generally states would continue to accept those funds even with the requirement that they waive their sovereign immunity. Therefore, CBO estimates that implementing S. 928 would have no significant impact on the federal budget.

The bill could affect direct spending; therefore, pay-as-you-go procedures would apply. CBO expects that any change in direct spending would be insignificant, however, because it is unlikely that states would choose to not receive federal funds that they collect under current law.

Because the waiver of sovereign immunity under this bill would be a condition for the receipt of federal funds, it would not be an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). States that continue to accept federal assistance may face significant additional costs due to lawsuits brought under the Age Discrimination in Employment Act. CBO has no basis for estimating either the likelihood, number, or outcome of such lawsuits. S. 928 contains no private-sector mandates as defined in UMRA.

The staff contacts for this estimate are Lanette J. Walker (for federal costs), and Leo Lex (for the state and local government impact). The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VI. Regulatory Impact Statement

The committee believes that it is impractical to prepare a regulatory impact statement at this time because the number of States affected will depend on which States accept the conditions of aid imposed by this bill.

VII. Application of Law to the Legislative Branch

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act, requires a description of the application of the bill to the legislative branch. S. 928 applies to State programs and activities that accept Federal financial assistance. It does not apply to the legislative branch.

VIII. MINORITY VIEWS

The relationship between the Federal and State Governments has changed in recent decades, and the undersigned members believe that Federal legislation and federal lawsuits are not necessarily the only answer to the concern shared by all members of the committee that workers are protected from age discrimination.

The impetus for the proposed legislation is the Supreme Court decision in *Kimel* v. *Florida Board of Regents* (2000). That case was the most recent in a series defining what is being called the "New Federalism," in which the Court recognizes that the Eleventh Amendment restricts the power of Congress to impose Federal workplace laws on the States as employers. Specifically in the *Kimel* case, the Court ruled that State employees do not have a private right of action under the Age Discrimination in Employment Act because the States did not waive their sovereign immunity. S. 928 is designed to overturn the outcome of the Kimel decision and grant most State employees a private right of action in Federal court to sue their employers.

BACKGROUND

The rulings of the Supreme Court in this and other recent cases clarify the scope of Congressional authority. A general understanding of the parameters is useful in considering the legislative options raised by S. 928.

To varying degrees, Congress can regulate non-federal workplaces through three separate sets of powers. The Commerce Clause is used very broadly to control behavior in the private sector and at the local government level.

Congress' power over the States is restricted by the Eleventh Amendment; in most cases a State's sovereign immunity cannot be abrogated by Congress and States in most instances cannot be sued in Federal court by individuals. The exception is found in the Enforcement Clause (Section 5) of the Fourteenth Amendment, which allows suits against the States in Federal courts for constitutional violations of the Equal Protection clause. The post-Civil War amendment to the Constitution was designed to remedy state-sanctioned discrimination and to ensure fair trials in Federal courts in a region of the country where State courts had a history of denying the civil rights and protections to blacks and other minorities.

In the *Kimel* decision, the Supreme Court ruled that age is not automatically a suspect class and Congress did not make the case that age discrimination by State governments was so pervasive and irrational as to rise to the level of a constitutional violation. As a result, Congress improperly relied on the Enforcement Clause of the Fourteenth Amendment to justify suits by State employees against the State in Federal court.

This leaves Congress' Spending Clause powers as the last avenue for creating a Federal cause of action against the States. The Supreme Court has held that Congress has wide latitude in fixing the conditions for the voluntary receipt of Federal money.

S. 928 utilizes the Spending Clause power and requires that "receipt or use of Federal financial assistance for a program or activity constitutes a State waiver of sovereign immunity from suits by employees within that program or activity for violations of the Age Discrimination in Employment Act of 1967."

The operative language of the legislation defining "program or activity" utilizes the definition and scope of spending power exercised in the provision of the Age Discrimination Act of 1975 (42 U.S.C. Sec. 6107) which extends the right to sue to beneficiaries of federally assisted programs run by the States. This language was added to that law in the Civil Rights Restoration Act of 1987 (29 U.S.C. Sec. 794). Commonly known at the time as the *Grove City* bill, the legislation also added the "program or activity" language to the Title IX of the Educational Amendments Act of 1972, to the Rehabilitation Act, and to Title VI of the Civil Rights Act of 1964.

ARGUMENTS IN OPPOSITION

The Supreme Court has ruled that age discrimination is beyond the scope of Congressional authority when it comes to regulating the affairs of the States. Deference to federalism principles and to States' rights argue in favor of leaving this issue to the States themselves to resolve. Deference to a state's sovereign immunity is not a partisan issue. In the recent case, *Laro* v. *State of New Hampshire* (1st Cir., August, 6, 2001), the Democrat Governor and Attorney General staunchly and successfully defended the State's sovereign immunity under the Family & Medical Leave Act.

It is equally important that 48 States already have age discrimination laws on their books and have procedures for their enforcement. This point was stressed by Justice O'Connor in her majority decision in *Kimel.* The officials of each those States, who are elected directly by the people affected by the laws, have chosen to tailor their laws and procedures to the needs and cultures of the states. S. 928 ignores the good faith efforts of the officials of those States and imposes a different set of rules. No evidence has been presented to the committee that State causes of action are inadequate, or that the rights of State employees are regularly being denied. Except for a statistical comparison of State laws, the majority report makes no effort to prove such a case. The pending legislation improperly relies on the blanket and unfounded assumption that the right to sue in Federal court under Federal law is always preferred. We reject this assumption.

The *Kimel* majority ruled that age discrimination is not the same thing as race discrimination and does not require the same level of Federal enforcement. That was also the view of Congress when it passed the Age Discrimination Act of 1975, the law on which S. 928 relies to exercise Congress' Spending Clause authority. The Senate committee report accompanying that bill stressed the difference: "Distinguishing among individuals on the basis of race * * * is per se unfair treatment and violative of the Constitution * * *. But age may often be a reasonable distinction for these pur-

poses * * *." It follows that States should be allowed to make the determination of whether policies are reasonable and to enforce those policies.

It can also be said that S. 928 creates yet another opportunity for trial lawyers to shop for the friendliest forum to bring suit and recover large monetary judgments. While subjecting businesses to crippling lawsuits should always be of concern, even greater care should be given to legislation that opens up a public treasury to individual gain.

For all of the foregoing reasons, the undersigned dissent to the majority report accompanying S. 928.

STATE RESPONSIBILITY ALTERNATIVE

At the markup on S. 928 conducted on September 14, 2001, Senator Gregg was prepared to offer an alternative that would not have imposed a one-size-fits-all approach to State employee coverage under the ADEA. The Gregg amendment would have provided a middle ground position that ensures a remedy for State employees while preserving the sovereign immunity of the States. Senator Gregg's "State Responsibility" amendment would have limited the application of S. 928 only to those States that have no age discrimination law with remedies and enforcement procedures in State court equal to those provided in the Age Discrimination in Employment Act.

This approach is similar to the enforcement scheme under the Occupational Safety and Health Act. The OSH Act provides for State control and enforcement of safety and health issues where the State standards "are or will be at least as effective in providing safe and healthful employment as the standards promulgated" by OSHA. State plans must also have a safety and health program that is "applicable to all employees of public agencies of the State and its political subdivisions" and that applies standards that are "as effective as the standards contained in the approved [State] plan." (29 U.S.C. Sec. 667(c)). Like the OSH Act, a State Responsibility provision would adopt the modern appreciation of the competence of the States in dealing with the workplace needs of their citizens.

Also, it is more than likely that a state law applies to more employees than S. 928 which relies on Congressional Spending Clause powers. The proposed definition of "program or activity" found in S. 928 is limited to "the entity of such State and local government that distributes such assistance and each such department or agency * * * to which the assistance is extended." This means that for "State and local governments, only the department or agency which receives the aid is covered * * *," according to the Senate Labor and Human Resources committee report accompanying the Civil Rights Restoration Act of 1987. As acknowledged in the majority report, gaps in federal coverage under S. 928 will no doubt exist. For example, Federal money for a "program or activity" does not typically reach the legislature or judiciary of a State, and employees of those branches of State government would not be covered under S. 928. State age discrimination laws are free to apply more broadly and cover workers missed by the ADEA as amended by S. 928. A State responsibility approach would give States the incen-

tive to expand coverage of their age discrimination laws, thus better serving the State employees than the approach taken in S. 928.

CONCLUSION

The undersigned members of the committee are committed to purposes of the Age Discrimination in Employment Act and share the concern of the majority for the protection of State employees. We dissent from S. 928 for the reasons that the bill is unnecessarily proscriptive of States' rights and fails to consider less disruptive alternatives. For these reasons we respectfully dissent.

JUDD GREGG.
MICHAEL B. ENZI.
JOHN WARNER.
JEFF SESSIONS.
MIKE DEWINE.
BILL FRIST.
TIM HUTCHINSON.
KIT BOND.
PAT ROBERTS.

IX. CHANGES IN EXISTING LAW

In compliance with rule XXVI, paragraph 12, of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

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RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 7. (a) * * *

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(g)(1)(A) A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee of that program or activity under this Act for equitable, legal, or other relief authorized under this Act.

(B) In this paragraph, the term "program or activity" has the meaning given the term in section 309 of the Age Discrimination Act of 1975 (42 U.S.C. 6107).

(2) An official of a State may be sued in the official capacity of the official by any employee who has complied with the procedures of subsections (d) and (e), for injunctive relief that is authorized under this Act. In such a suit the court may award to the prevailing party those costs authorized by section 722 of the Revised Statutes (42 U.S.C. 1988).

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